## BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| **RHONDA D. ROSS** | ) | |
| Claimant | ) | |
| v. | ) | |
| | ) | Docket No. 1,067,494 |
| **TOWN PLAZA FAMILY PRACTICE** | ) | |
| Respondent | ) | |
| and | ) | |
| | ) | |
| **ACE AMERICAN INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requests review of the June 8, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Claimant appears by James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier (respondent) appears by John R. Fox of Kansas City, Missouri.

### ISSUES

In this claim for repetitive trauma injuries to the upper extremities, the ALJ found claimant's date of accident was her last day of work for respondent on May 6, 2013, and therefore concluded the "new Act"[1] applies to this claim. The ALJ also found claimant's alleged repetitive trauma from her computer use was not the prevailing factor causing her carpal tunnel syndrome. The ALJ denied claimant's request for preliminary relief.[2]

Claimant contends the law preceding the new Act applies to this claim. According to claimant, the uncontradicted evidence established she gave notice of her injuries by repetitive trauma to her supervisor. Moreover, respondent had actual knowledge of her injuries, before the effective date of the new Act. Claimant further maintains she was diagnosed with carpal tunnel syndrome by respondent's physician before the new Act's effective date. According to claimant, when she was diagnosed with carpal tunnel syndrome, the law only required that her repetitive trauma contributed to her injuries and

[1] In this Order, "new Act" refers to the extensively amended Workers Compensation Act that became effective on May 15, 2011.

[2] It appears TTD was an issue before the ALJ. P.H. Trans. (June 8, 2016) at 33, 43.

need for medical treatment. Claimant urges the Board to overturn the ALJ's decision and award her medical treatment.

Respondent requests the Board affirm the ALJ's decision.

The issue are:

1. What is claimant's date of injury by repetitive trauma and does the new Act, or the law in effect prior thereto, apply to this claim?

2. Depending on the outcome of the first issue, was notice or "actual knowledge" proven?

3. Did claimant's alleged injuries by repetitive trauma arise out of and in the course of her employment, including, if applicable, was "prevailing factor" proven?

## FINDINGS OF FACT

Following an internship in November and December 2010, claimant started working for respondent in February 2011 as a "medical assistant floater."[3] In that capacity, she was assigned to different physicians on an as-needed basis, performing a variety of duties, including testing patients' vital signs and entering such information into a laptop computer she carried.

Claimant initially testified she carried the laptop, which weighed about 10 pounds, her entire work day. She later admitted she did not carry the laptop for her entire workday, and performed other duties not involving carrying the laptop, although she used a keyboard on a desktop at various times in her workday. Claimant testified she worked 50 hours per week, receiving overtime, from the beginning of her employment with respondent.

Claimant testified she first developed symptoms in her left upper extremity around April 1, 2011. She also testified she first noticed symptoms in March, 2011. Her symptoms consisted of numbness, tingling and sharp pain in her left hand that radiated into her left arm and shoulder. Within a couple of months, she developed similar symptoms in her right upper extremity. Claimant testified she was awakened at night with numbness in her fingers and hands. Claimant asserted she had no numbness or tingling in either hand prior to working for respondent.

Claimant believed she talked about her symptoms with her supervisor, Suzanne Smith, sometime in the latter part of April 2011. According to claimant, she did not tell her supervisor she sustained a work-related injury or that she wanted to file a workers

[3] P.H. Trans. (June 8, 2016) at 5.

compensation claim. Claimant also testified she told her supervisor her work duties were causing her problems.

Respondent sent claimant to Lisa A. Schnick, D.O., in May 2011. Dr. Schnick ordered EMG/NCV testing that was conducted on June 17, 2011, revealing bilateral median nerve entrapment, consistent with severe bilateral carpal tunnel (CTS). Dr. Schnick recommended an orthopedic consultation.

Claimant saw Suzanne G. Elton, M.D., an orthopedic surgeon, on July 8, 2011, complaining of bilateral hand pain that had limited her activities for four and a half months. Claimant's pain was worsening, and she experienced numbness and tingling in her index, long and ring fingers; sharp shooting pain in her hands, radiating into her forearms and shoulders; and weakness in her hands. Claimant told Dr. Elton her pain was continuous and awakened her at night.

Dr. Elton diagnosed bilateral CTS. Dr. Elton provided a cortisone injection, but the doctor advised claimant needed surgery. The injection helped for about two months, but respondent authorized no CTS surgeries. Dr. Elton provided claimant with bilateral wrist splints and bilateral carpal tunnel injections.

Dr. Elton re-examined claimant on March 18, 2014. Claimant stated her symptoms worsened and believed her employment caused her carpal tunnel. An April 10, 2014, EMG showed claimant's CTS was worsening. Dr. Elton's report of May 9, 2014, stated:

> Ms. Ross began her employment at Town Center Family Practice on 2/4/2011. She states that her date of injury is 4/1/2011. An EMG from 6/17/2011 showed severe carpal tunnel syndrome. It is extremely unlikely that, in this short period of time, Ms. Ross could have developed severe carpal tunnel syndrome as shown on her EMG. She likely had longstanding carpal tunnel syndrome as evidenced by her severe EMG parameters.
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> I do not feel that, in my opinion, the injury described while working on the job was capable of causing the pathology that has been diagnosed, and the workplace incident is not the prevailing cause of the current symptoms. I feel that treatment under workman's compensation is not appropriate at this time.[4]

Dr. Elton again recommended bilateral endoscopic carpal tunnel releases, but respondent did not authorize the procedures.

Claimant testified she did not know how to report or handle a workers compensation claim or a work-related injury. Claimant admitted that when she was hired she saw a

[4] P.H. Trans. (June 8, 2016), Resp. Ex. A.

PowerPoint presentation about employment rules. Claimant understood that only needle sticks had to be reported to respondent.

Claimant asserted that when her hands became numb, she did not think of workers compensation because she believed compensation was for accidents such as falling down stairs or breaking a limb. Claimant did not understand the numbness she developed in her hands had anything to do with workers compensation.

Claimant saw George Varghese, M.D., after a car accident in 2007. Claimant testified she disagreed with Dr. Varghese's records that stated she had numbness or weakness in her left hand, because she saw him only for a neck injury. Claimant also disputed the accuracy of Dr. Varghese's record of numbness on the palmar surface of digits two to five on her left hand, worse at night when reclining.

Allen Greiner, M.D., is claimant's personal physician. Claimant disagreed with Dr. Greiner's records from October 29, 2010, that stated she complained of numbness in her right hand or forearm during sleep.

Claimant's employment with respondent was terminated on May 6, 2013, because of an incident involving striking another employee. Claimant testified the coworker struck her, but she admitted her application for unemployment benefits did not state the coworker struck claimant.

Lynn D. Ketchum, M.D., evaluated claimant on April 23, 2015, at the request of claimant's counsel. Claimant reported symptoms of pain, numbness and tingling that began two months after she started working for respondent. According to claimant, her CTS symptoms were increasing. Dr. Ketchum noted that in both of claimant's EMGs there was no evidence of polyneuropathy to implicate diabetes as a causative factor and she had negative Tinel's sign bilaterally. Dr. Ketchum recommended claimant have open carpal tunnel releases in the near future.

Regarding causation, Dr. Ketchum opined claimant did not have symptoms in her prior work for over 10 years at the University of Kansas Medical Center and Quest Diagnostics. Obesity played a part in causing claimant's CTS. Dr. Ketchum also observed claimant's symptoms came on relatively soon after she began working for respondent. In Dr. Ketchum's opinion, the work claimant did for respondent was the prevailing factor in causing her carpal tunnel syndrome or bringing them to clinical awareness.

The ALJ ordered claimant be examined by Lowry Jones, M.D., who claimant saw on April 7, 2016. Dr. Jones took a history, reviewed medical records and performed a physical examination. Claimant told Dr. Jones her symptoms began in February 2011, when she began having numbness in her arms and pain radiating up both arms to her shoulders and into her upper back.

Dr. Jones diagnosed developing shoulder-hand syndrome with impingement changes in both shoulders and clinical ulnar neuropathy. Her 2011 EMG showed severe carpal tunnel disease which had been progressing through 2014. Dr. Jones report states:

> Severe carpal tunnel disease does not develop in one year. She has performed very similar activity since 1998. Carpal tunnel disease occurs with or without repetitive activity. She did repetitive activity but it had been ongoing for twenty years plus. The fact that she increased her activity slightly for one year in my opinion does not suggest that it is the prevailing cause for "severe carpal tunnel disease . . . ."
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> . . . My opinion is that her present complaints are consistent with developing shoulder-hand syndrome. She has severe carpal tunnel disease which I do not believe was isolated in its cause to her activity at Town Plaza Family Practice. I believe this is multifactorial, and due to her activity over the past twenty years. I do not believe there is any isolated activity that is the source of her symptoms.[5]

Dr. Varghese treated claimant for mechanical neck pain and traumatic torticollis. His progress notes from January 7, 2008, state:

> Additionally, the patient has a new onset complaint of numbness and weakness of the left hand. The patient states that she has weakness of the shoulder, however, this appears to be secondary to muscle pain, but the patient also reports left hand weakness in which she is now dropping things. The patient also describes numbness of the palmar surfaces in digits 2-5. The patient states that her symptoms appear to be worst at night when lying in bed which the patient describes as an intense achy sensation, as well as the constant numbness of the aforementioned fingers.[6]

Dr. Greiner performed claimant's yearly physical exam on October 29, 2010. Under the Past History section, Dr. Greiner's records state:

> 2. Neuropathy
> - Patient had MVA in '07
> - "C3-C4 cracked" during accident.
> - Patient complains of numbness near dorsal aspect of right hand and right forearm. She believes this numbness occurs due to her sleep position.
> - Patient denies sharp, shooting pains or s/s of nerve impingement.[7]

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[5] Jones IME report at 3.

[6] P.H. Trans. (June 8, 2016), Resp. Ex. B at 1.

[7] P.H. Trans. (June 8, 2016), Resp. Ex. C at 1.

The record does not reflect that claimant was diagnosed with CTS before she worked for respondent.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-508(d) defines "accident" as:

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2010 Supp. 44-508(d) provides:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8]

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9] The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of

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[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

compensation and to prove the conditions on which that right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

K.S.A. 2011 Supp. 44-508 provides in relevant part:

> (e) . . . "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related;
> or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

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[10] K.S.A. 2010 Supp. 44-501(a).

[11] K.S.A 2010 Supp. 44-508(g).

[12] *Kindel, supra.*

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The Board need not address whether the new Act, or the law in effect before May 15, 2011, applies to this claim because the claim is not compensable under either law. Although claimant clearly has bilateral CTS, the question is one of causation.

Claimant commenced working for respondent in February 2011, performing, as she described it, a relatively light duty job. Her work included using a laptop computer, which she initially testified she used for entire shifts. However, she changed her testimony about the extent of her use of the laptop, which she ultimately admitted she used the laptop about one-third of her time, although at other times she entered data on a desktop. It is difficult to conclude the work claimant performed as "repetitive" in nature. Claimant testified she began having left upper extremity symptoms in March 2011, although she later changed her story and testified her symptoms began around April 2011. According to claimant, she developed severe upper extremity injuries in a matter of weeks.

Claimant's credibility has been called into serious question. She disagreed with virtually all of the medical records that pre-dated her alleged repetitive trauma. She changed her testimony several times and the histories she provided to the physicians were inconsistent. Claimant's testimony is provided little weight because it is unreliable.

Both the new Act and prior law require claimant prove a causal connection between the alleged accident or repetitive trauma and the injuries alleged. Prior law (as well as the current statute) refers to a required causal connection between the conditions under which the work is required to be performed and the resulting injury. The new Act requires repetitive trauma shall be deemed to arise out of employment only if, *inter alia,* the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

The medical evidence, including the quotations set forth above, do not support the notion claimant sustained injury by repetitive trauma arising out of her short-term employment with respondent. The opinions of Dr. Elton and Dr. Jones indicate claimant's work for respondent did not cause any injury, nor was such work the prevailing factor in causing claimant's injuries, medical condition, or impairment or disability.

Under the circumstances, the undersigned Board Member affirms the ALJ's preliminary Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Claimant's alleged injuries by repetitive trauma did not arise out of and in the course of her employment, and the "prevailing factor" requirement was not proven.

Claimant's repetitive trauma is not compensable under the new Act or prior law, rendering the issue of which law applies moot, at least for present purposes.

## DECISION

**WHEREFORE**, the preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh dated June 8, 2016, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of August, 2016.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge

[13] K.S.A. 44-534a.